Supreme Court, U.S.

001278 FEB - 5 2001

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No.

IN THE

Supreme Court of the United States

AIRMAN BASIC (E-1) MARILYN M. FARRELL-FRANCIS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeal for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

JEFFREY A. VIRES
Major, U. S. Air Force
Air Force Legal Services Agency
Counsel of Record

JAMES R. WISE
Counsel for Petitioner
Colonel, U.S. Air Force
Air Force Legal Services Agency

TIMOTHY W. MURPHY
Counsel for Petitioner
Lt Colonel, U.S. Air Force
Air Force Legal Services Agency

Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB D.C. 20332-8000
(202) 767-1563

February 2001

39pp

QUESTION PRESENTED[1]

Whether the United States Court of Appeals for the Armed Forces erred in holding that this Honorable Court's recognition of a psychotherapist-patient privilege in *Jaffee v. Redmond*, 518 U.S. 1 (1996) did not apply to military courts-martial, despite the language of Article 36, U.C.M.J. [10 U.S.C. § 836], Mil.R.Evid. 101(b) and 501(a)(4), providing that rules of evidence generally recognized in the trial of criminal cases in the United States district courts shall apply.

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[1] This same question is presented in the petition for a writ of certiorari filed on December 20, 2000 with this Honorable in the case of *United States v. Rodriguez*, No. 00-1038.

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The petitioner, Airman Basic Marilyn Farrell-Francis, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in her case on November 16, 2000.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Farrell-Francis*, USCA Dkt. No. 00-0280/AF, is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals (No. ACM 32907, December 7, 1999) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on November 16, 2000.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (West Supp. 1999) and 10 U.S.C. § 867(a)(3) (West Supp. 1999).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Constitution, the Uniform Code of Military Justice (U.C.M.J.), and the Manual for Courts-Martial (M.C.M.) are set forth in Appendix C, p. 7a-25a.

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[1] Appendix A, p. 1a.

STATEMENT OF THE CASE

Facts:

The Petitioner did not report to work on Thursday, January 9, 1997; Friday, January 10, 1997; or Monday, January 13, 1997, as scheduled. On January 10, 1998, the Petitioner made a telephone call to the Kimball Medical Center in Lakewood, New Jersey. She called because she was seeking mental health assistance for her depression, suicidal thought, and financial and marital stress. On January 13, 1997, during the day shift, the petitioner again telephonically contacted the Kimball Medical Center and indicated that she was seeking help for depression and the stressors of her pending divorce. After she made the phone call, the petitioner went to the Kimball Medical Center seeking hospitalization and psychiatric help for her depression and anxiety. Upon her arrival at the medical center, the petitioner went to see a triage nurse because of a self-inflicted cut on her wrist.

After reviewing the triage nurse's notes, Jennifer O'Hearns, a psychiatric emergency screener, spoke to the petitioner. Miss O'Hearns and the petitioner discussed the reasons for her telephone calls, her suicide attempt and the cut on her wrist, whether she was still suicidal and some of her depressive symptoms as part of a full mental status exam of the petitioner, which included, *inter alia,* substance abuse. Prior to discussing the petitioner's history of substance abuse, Miss O'Hearns did not explain confidentiality issues to the petitioner, and the petitioner did not ask any such questions. The

petitioner told Miss O'Hearns that she had used cocaine just once that week. After discussing her recent drug use, the petitioner expressed a concern to Miss O'Hearns about confidentiality. Miss O'Hearns told the petitioner not to worry because the medical records could only be obtained with a subpoena or through a hospital to hospital transfer. It is customary for such records to be transferred with the patient when the patient transfers to another medical facility. The petitioner was transferred to a military facility on January 17, 1997.

Proceedings below:

On May 13-15, 1997, the Petitioner was tried by a general court-martial convened at McGuire Air Force Base, New Jersey. Contrary to her pleas, the petitioner was found guilty of one specification of being absent without authority from her unit and one specification of the wrongful use of cocaine, in violation of Articles 86 and 112a, respectively, of the Uniform Code of Military Justice [hereinafter cited as U.C.M.J.] (10 U.S.C. §§ 886 and 912a). All her offenses were alleged to have occurred between January 1-14, 1997. She was sentenced to a bad conduct discharge and confinement for 18 months. Pursuant to Article 58b, U.C.M.J. (10 U.S.C. §858b), the convening authority waived $750.00 pay per month of the required forfeitures for a period of six months to be paid for the benefit of her three minor children.

The petitioner made a motion a trial to suppress her drug use admission to Ms O'Hearn. The basis of the motion was this Honorable Court's ruling

in *Jaffee v. Redmond*[2], which recognized a common law psychotherapist-patient privilege in federal judicial proceedings. The trial judge denied the motion and ruled the *Jaffee* decision did not create a psychotherapist-patient privilege in the military under the common law or the Military Rules of Evidence.

On appeal to the Air Force Court of Criminal Appeals, the petitioner argued the trial judge erred by not granting her motion to suppress her admission of cocaine use on the basis of this Honorable Court's decision in *Jaffee*. On December 7, 1999, the Air Force Court of Criminal Appeals affirmed the findings and sentence as adjudged. (Appendix B). The Air Force Court of Criminal Appeals held that the trial judge did not abuse his discretion nor did he err when he denied the petitioner's motion to suppress her admission to Ms. O'Hearn, stating that Mil.R.Evid. 501(d) does not set forth a physician-patient privilege in a court-martial, and declining to create a psychotherapist-patient privilege in the petitioner's case.

On September 20, 2000, the United States Court of Appeals for the Armed Forces granted review on the following issues:

I. WHETHER THE MILITARY JUDGE ERRED BY NOT GRANTING THE DEFENSE MOTION TO SUPPRESS APPELLANT'S ADMISSION OF

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[2] 518 U.S. 1 (1996).

COCAINE USE BASED ON THE ERRONEOUS FINDING THAT THE PSYCHOTHERAPIST-PATIENT PRIVILEGE WAS NOT APPLICABLE AT COURTS-MARTIAL.

II. WHETHER THE MILITARY JUDGE ERRED BY NOT GRANTING APPELLANT'S MOTION TO SUPRESS THE RESULTS OF HER URINALYSIS TEST FOR LACK OF PROBABLE CAUSE.

On November 16, 2000, the United States Court of Appeals for the Armed Forces affirmed the decision below, citing their decision in *United States v. Rodriguez*.[3] The question presented in this petition is based on the first issue granted by the Court of Appeals for the Armed Forces. In *Rodriguez*, Court of Appeals for the Armed Forces held that a psychotherapist-patient privilege was not applicable to trials by courts-martial prior to November 1, 1999, the effective date of Mil.R. Evid. 513. Crawford, C.J., joined by Effron, J., found a psychotherapist-patient privilege at the time of the petitioner's court-martial contrary to and inconsistent with Mil.R.Evid. 501(d), which stated there was no physician-patient privilege in trials by courts-martial. The Court considered the President's adoption of Mil.R.Evid. 513 on October 6, 1999, effective for "communications made after 1

[3] 54 M.J. 156 (2000).

November 1999"[4], demonstrated the President's commitment to occupy the filed by: (1) not relying on Mil.R.Evid. 501(a)(4); and (2) adopting a Rule that does not literally incorporate *Jaffee.*

Sullivan, J., concurring in part and concurring in the result, supported the plurality's opinion as it related its decision that Mil.R.Evid. 501(d) at the time of the petitioner's statements and trial precluded a privilege for statements made to a physician. Even if *Jaffee* created a pyschotherapist-patient privilege in trials by court-martial prior to the effective date of Mil.R.Evid. 513, Judge Sullivan would have found the appellant's statements to fall within an exclusion for instances in which the psychotherapist believes a patient's mental or emotional condition makes that patient a danger to herself or others.

Gierke, J., joined by Cox, Senior J., dissenting, followed this Honorable Court's decision in *Jaffee*, and found no justification in law or policy denying the petitioner this common law privilege. Their decision focused on the language in *Jaffee* emphasizing the difference between "physicians" and "psychotherapists", as well as the plain language of the rules, of course.

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[4] 64 Fed.Reg. 55120.

REASON FOR GRANTING THE WRIT

Summary

The psychotherapist-patient privilege became applicable to trials by courts-martial as a result of this Honorable Court's decision in *Jaffee*. The President determined that the federal common law provisions, with certain inapplicable exceptions, may be claimed by an accused in a court-martial. Despite the fact that the decision to recognize a privilege rests with the President, the United States Court of Appeals for the Armed Services has created its own rules for courts-martial that are directly contrary to the rules properly promulgated by the President. This Honorable Court should exercise its supervisory power to ensure that the Court of Appeals for the Armed Services does not preempt and frustrate the constitutional and statutory scheme that empowers the President to determine the evidentiary rules for courts-martial.

Source of Presidential Authority to Prescribe Rules for Courts-Martial

The President's authority to prescribe the rules for courts-martial is derived from both the Constitution and from congressional enactment. The Constitution establishes that the President is the Commander in Chief of the armed forces.[5] Under Article 36, U.C.M.J. [10 U.S.C. § 836], Congress expressly granted to the President the authority to

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[5] U.S. Const., Art. II, § 2.

promulgate rules of evidence for trials by courts-martial. Congress, however, mandated that when exercising this authority to promulgate evidentiary rules, the President "shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [the U.C.M.J.]"[6]

The President's Exercise of his Authority to Prescribe Rules for Courts-Martial

By his authority pursuant to 10 U.S.C. § 836(a), the President promulgated the Military Rules of Evidence[7], which are set forth in the Manual for Courts-Martial, United States, 1984. Mil.R.Evid. 101(b) provides:

> If not otherwise prescribed in this Manual or these rules, and insofar as practicable and not inconsistent with or contrary to the code or this Manual, courts-martial shall apply:
>
> (1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and

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[6] Article 36, U.C.M.J. [10 U.S.C. § 836(a)]

[7] Executive Order No. 12473, 49 Fed. Reg. 17,152 (1984), as amended.

(2) Second, when not inconsistent with subdivision (b)(1), the rules of evidence at common law.

Mil.R.Evid. 501(a)(4) provides that a person may not claim a privilege with respect to any matter except as required by or provided for in: . . ."(t)he principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual."

As the language of Mil.R.Evid. 501 indicates, Fed.R.Evid. 501 does not specifically enumerate which privileges are applicable in the federal courts, but instead provides that evidentiary privileges are common law principles as interpreted in the United States district courts. Therefore, it is necessary to examine whether the courts of the United States have recognized a particular privilege under F.R.Evid. 501 to determine whether a common law privilege applies to courts-martial by application of Mil.R.Evid. 501(a)(4).

This Honorable Court's decision in *Jaffee v. Redmond*[8], recognized a common law psychotherapist-patient privilege in federal judicial proceedings. Although *Jaffee* was a civil action, its holding applies to criminal proceedings in federal court as well. In *Swidler & Berlin v. United States*[9],

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[8] 518 U.S. 1, 18 (1996).

[9] 524 U.S. 399 (1998).

this Honorable Court found that "there is no case authority for the proposition that the [attorney-client] privilege applies differently in criminal and civil cases." Several Circuits have recognized that the psychotherapist-patient privilege applies in both criminal and civil cases.[10]

In *Jaffee*, this Honorable Court examined Fed.R.Evid. 501 which "authorizes federal courts to define new privileges by interpreting 'common law principles. . .in the light of reason and experience.'"[11] It observed the Rule 501 "did not freeze the law governing the privileges of witnesses in federal trials[.]" While recognizing that a trial is a search for the truth, this Honorable Court acknowledged that public policy may require certain exemptions and exceptions to the admissibility of evidence.[12] Public policy protects certain communications to encourage individuals to seek assistance; for example, the attorney-client privilege. Society should encourage an individual to seek assistance from a psychotherapist, but such assistance would not be encouraged if there were not "an atmosphere of confidence and complete disclosure of facts, emotions, memories, and fears." The importance of this privilege was recognized by the Judicial Conference Advisory Committee.[13] This Honorable Court noted that if the privilege was not recognized, "confidential conversations between

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[10] *In re Doe*, 964 F.2d 1325 (2nd Cir. 1992); *In re Zuriga*, 714 F.2d 632 (6th Cir. 1983); *United States v. Schwenson*, 151 F.3d 650, 656-57 (7th Cir. 1998); *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998).

[11] 518 U.S. at 8.

[12] *Id.* at 9.

[13] *Id.* at 10.

psychotherapists and their patients would surely be chilled[.]"[14] The Court concluded that on the basis of "reason and experience," a psychotherapist privilege "promotes sufficiently important interests to outweigh the need for probative evidence."[15]

In *Jaffee*, this Honorable Court recognized that there is a fundamental difference between treatment by a physician and a psychiatrist, stating that

> [t]reatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. . .[16]

The Preemption and Frustration of Presidential Authority by the United States Court of Appeals for the Armed Forces

Following this Honorable Court's decision in *Jaffee*, the Court of Appeals for the Armed Forces, in *United States v. English*[17], stated in dicta that the

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[14] *Id.* at 11-12.
[15] *Id.* at 9-10.
[16] 518 U.S. at 10.
[17] 47 M.J. 215, 216 (1997).

MCM "does not recognize a general doctor-patient or psychotherapist-patient privilege." In *English*, however, the appellant did not assert the privilege, and the Court did not address whether *Jaffee*'s recognition of a psychotherapist-patient privilege applied to courts-martial.[18] In a subsequent case, the Court of Appeals for the Armed Forces noted its statement in *English*, but specifically declined to decide whether the psychotherapist privilege recognized in *Jaffee* applies to the military because the appellant did not show that he had standing to claim the privilege on behalf of another person.[19]

In affirming the decision of the Air Force Court of Criminal Appeals, the United States Court of Appeals for the Armed Forces held in *United States v. Rodriguez*[20], a companion case, that this Honorable Court's decision in *Jaffee*, despite the language contained in Mil.R.Evid. 101(b) and 501(a)(4), does not create a psychotherapist-patient privilege in the military, stating that the President "occupied the field" through his exclusion of a physician-patient privilege in Mil.R.Evid. 501(d), precluding the application of a doctor-patient or psychotherapist-patient privilege to the military.

To the extent that there existed any ambiguity concerning the scope of Mil.R.Evid. 501(d), that ambiguity was conclusively resolved on October 6, 1999, when the President, subsequent to the

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[18] *Id.* at 216, n. 2; *see also id.* at 223, n. 3 (Crawford, J., dissenting, "*Jaffee*'s applicability to the military is not at issue in this case and need not be decided today.").

[19] *United States v. Flack*, 47 M.J. 415, 417 (1998).

[20] USCA Dkt. No. 00-0280/AF

petitioner's court-martial, acting pursuant to his authority under Article 36, 10 U.S.C. § 836, issued Executive Order prescribing Mil.R.Evid. 513.[21] This new evidentiary rule recognized a psychotherapist-patient privilege in all cases arising under the U.C.M.J.[22] The analysis for Mil.R.Evid. 513 explains:

> Rule 513 clarifies military law in light of the Supreme Court decision in *Jaffee*. . .*Jaffee* interpreted Federal Rule of Evidence 501 to create a federal psychotherapist-patient privilege in civil proceedings and refers federal courts to state laws to determine the extent of privileges. In deciding to adopt this privilege for courts-martial, the committee balanced the policy of following federal law and rules, when practicable and not inconsistent with the UCMJ or MCM, with the needs of commander for knowledge of certain types of information affecting the military.

By its language, Mil.R.Evid. 513 applies to statements made after November 1, 1999.[23] However, the President's action in prescribing Mil.R.Evid. 513 is relevant to and sheds light on the unfounded policy decision and legal interpretation made by the Court of Appeals for the Armed Forces in *Rodriguez*. The President's promulgation of Mil.R.Evid. 513

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[21] Executive Order No. 13140, 64 Fed.Reg. 55, 115 (1999).

[22] *Id.* at 55,116.

[23] *Id.* at 55,119-20.

without amending Rule 501(d)'s prohibition of a physician-patient privilege reflects that Rule 501(d) is not, and never was, inconsistent with the recognition of the psychotherapist-patient privilege in courts-martial proceedings.

The President's action also reflects that *Jaffee* applies to the military by operation of law.[24] The application of *Jaffee* to the military by operation of law occurs automatically unless such application would be inconsistent with the UCMJ or MCM or would not be practicable.[25] As the President has recognized, the application of *Jaffee* to the military is not impracticable or inconsistent with the UCMJ or MCM.[26] Therefore, *Jaffee* applied to the conduct of courts-martial, effective from the date of this Honorable Court's recognition of a federal psychotherapist-patient privilege on June 13, 1976 - which occurred prior to the petitioner's court-martial.[27] Thus, the Court of Appeals for the Armed Services erred in holding there was no psychotherapist-patient privilege in the military preceding the adoption of Mil.R.Evid. 513, applicable to statements made after November 1, 1999.

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[24] *See* 10 U.S.C. § 836; Mil.R.Evid. 101(b) and 501(a)(4).

[25] *Id.*

[26] Executive Order No. 13140, 64 Fed. Reg. At 55,122.

[27] *See Jaffee*, 518 U.S. at 1.

CONCLUSION

There is no justification in law or policy for denying the petitioner the protection of the common-law privilege recognized by this Honorable Court in *Jaffee*. Under Mil.R.Evid. 501(a)(4), the petitioner was entitled to invoke that common law privilege. The decision by the United States Court of Appeals for the Armed Forces nullifies Mil.R.Evid. 501(a)(4) and precludes service members from enjoying the same rights as all other Americans - rights the President determined service members should enjoy. Therefore, the petitioner respectfully requests that this Honorable Court grant certiorari to the United States Court of Appeals for the Armed Forces.

The petitioner respectfully requests this Court grant his petition for a writ of certiorari.

Respectfully submitted,

JEFFREY A. VIRES
Major, United States Air Force
Appellate Defense Counsel
Counsel of Record

TIMOTHY R. MURPHY
Lt Colonel, United States Air Force
Chief Appellate Defense Counsel

JAMES R. WISE
Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel for Petitioner

Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB, DC 20332-8000
(202) 767-1562

Appendix A

U.S. v. Marilyn M. FARRELL-FRANCIS.
No. 00-0280/AF.
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
2000 CAAF LEXIS 1248

November 16, 2000, Decided
PRIOR HISTORY: CCA 32907.

JUDGES: GIERKE, Judge (dissenting).

OPINION: On consideration of the granted issues in this case (Daily Journal September 20, 2000) in light of United States v. Rodriguez, 54 MJ 156 (2000), the decision of the United States Air Force Court of Criminal Appeals is affirmed.

DISSENT BY: GIERKE

DISSENT: GIERKE, Judge (dissenting): I dissent for the reasons set forth in my dissenting opinion in United States v. Rodriguez, 54 M.J. 156, 162-63 (2000).

Appendix B

UNITED STATES v. Airman Basic MARILYN M. FARRELL-FRANCIS, United States Air Force

ACM 32907

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

1999 CCA LEXIS 326

December 7, 1999, Decided

NOTICE:
NOT FOR PUBLICATION

PRIOR HISTORY:
Sentence adjudged 15 May 1997 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: Terry J. Woodhouse. Approved sentence: Bad-conduct discharge and confinement for 18 months.

DISPOSITION:
AFFIRMED.

COUNSEL:
Appellate Counsel for Appellant: Colonel Douglas H. Kohrt and Major Thomas R. Uiselt.

Appellate Counsel for the United States: Colonel Brenda J. Hollis, Colonel Michael J. Breslin, and Major Bruce T. Smith.

JUDGES:
Before YOUNG, HEAD, and ROBERTS, Appellate Military Judges. Senior Judge YOUNG and Judge HEAD concur.

OPINIONBY:
ROBERTS

OPINION:

OPINION OF THE COURT

ROBERTS, Judge:

The appellant was convicted contrary to her pleas of absenting herself from her unit without authority and cocaine use. Articles 86 and 112a, UCMJ, *10 U.S.C. § § 886,* 912a. A court composed of officer members sentenced her to a bad-conduct discharge and confinement for 18 months. The appellant assigned the following issues as error: (1) The trial judge erred by not granting appellant's motion to suppress appellant's admission of cocaine use that she made to a psychiatric emergency screener; (2) The trial judge erred by not granting appellant's motion to [*2] suppress the results of her urinalysis test for lack of probable cause; and (3) The appellant's sentence was inappropriately severe. Finding no error, we affirm.

The appellant failed to show up for work on 9 January 1997 and remained away from her unit until 14 January 1997. On 10 January 1997 she telephoned

the Kimball Medical Center, Lakewood, New Jersey, and stated she was looking for help for depression, and that she was having suicidal thoughts. The appellant also indicated she was in the military. On 13 January the appellant telephoned the same clinic and went to the clinic after 1300. She obtained emergency room treatment for a cut on her wrist, and then spoke with Ms. Jennifer O'Hearn, a psychiatric emergency screener. In the course of a routine mental status examination by Ms. O'Hearn the appellant mentioned her military status and reported her cocaine use.

The appellant made a motion at trial to suppress her drug use admission to Ms. O'Hearn. The basis of the motion and the assigned error on appeal is that the United States Supreme Court's ruling in *Jaffee v. Redmond, 518 U.S. 1, 135 L. Ed. 2d 337, 116 S. Ct. 1923 (1996),* created a common law psychotherapist-patient privilege under Mil. R. [*3] Evid. 501. The trial judge denied the motion and ruled that the *Jaffee* decision did not create a psychotherapist-patient privilege in the military under the common law or the Military Rules of Evidence.

We hold that the trial judge did not abuse his discretion nor did he err when he denied the appellant's motion to suppress her admission to Ms. O'Hearn. Article 36 of the UCMJ empowers the President to make regulations for pretrial, trial, and post-trial procedures, including modes of proof, for courts-martial. Article 36(a), UCMJ. The President prescribed a comprehensive set of rules pertaining to privileges in the Military Rules of Evidence. We refer to secondary sources such as the rules of evidence used in federal courts or at common law only "insofar

as practicable and not inconsistent with or contrary to the Code or this Manual." Mil. R. Evid. 101(b).

Military Rule of Evidence 501(d) plainly states that a physician-patient privilege does not exist in courts-martial. In *United States v. Brown, 38 M.J. 696, 699 (A.F.C.M.R. 1993),* we specifically declined to create a special physician-patient privilege to cover the facts and circumstances of that case. We also [*4] decline to create a psychotherapist-patient privilege in the appellant's case. The President recently created such a privilege by adding Mil. R. Evid. 513, Psychotherapist-patient privilege. (Exec. Order No. 13140, *64 Fed. Reg. 55115 (1999)).* This new privilege applies only to communications made after 1 November 1999. *Id.*

We considered the remaining matters submitted by the appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).* We find that, looking at the totality of the circumstances, there was probable cause for the military magistrate to authorize the search and seizure of the appellant's urine when she returned to her unit after being absent without authority. Mil. R. Evid. 315 (f)(2). The appellant's commander then acted in good faith when he ordered the appellant to provide a urine sample. Mil. R. Evid. 311(b)(3). Finally, we find that the appellant's sentence was not inappropriately severe. *United States v. Snelling, 14 M.J. 267 (C.M.A. 1982).*

The findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Accordingly, the findings and sentence [*5] are

AFFIRMED.

Senior Judge YOUNG and Judge HEAD concur.

Appendix C

1. Article II, § 2, of the United States Constitution provides in pertinent part:

The President shall be Commander in Chief of the Army and Navy of the United States...

2. 10 U.S.C. § 836(a) provides:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

3. The Military Rules of Evidence provide in pertinent part:

PRIVILEGES

Rule 501. General rule

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

(1) The Constitution of the United States as applied to members of the armed forces;

(2) An Act of Congress applicable to trials by courts-martial;

(3) These rules or this Manual; or

(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and to contrary to or inconsistent with the code, these rules, or this Manual.

*** * ***

(d) Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

*** * ***

Rule 513. Psychotherapist-patient privilege

(a) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made

for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who may claim the privilege.* The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege

may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion,

order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is constitutionally required.

(e) *Procedure to determine admissibility of patient records or communications.*

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear

at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise.

4. The Manual for Courts-Martial (MCM), United States (2000 ed.), app. 22, Analysis of the Military Rules of Evidence, provides in pertinent part:

PRIVILEGES

Rule 501. General rule

Section V contains all of the privileges applicable to military criminal law except for those privileges which are found within Rules 301, Privilege Concerning Compulsory Self-Incrimination; Rule 302, Privilege Concerning Mental Examination of an Accused; and Rule 303, Degrading Questions. Privilege rules, unlike other Military Rules of Evidence, apply in "investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence under Article 72; proceedings for search authorization; proceedings involving pretrial restraint; and in other proceedings authorized under the Uniform Code of Military Justice of this Manual and not listed in rule 1101(a)." *See* Rule 1101(c); *see also* Rule 1101(b).

In contrast to the general acceptance of the proposed Federal Rules of Evidence by Congress, Congress did not accept the proposed privilege rules because a consensus as to the desirability of a number of specific privileges could not be achieved. *See* generally, S. Saltzburg & K. Redden, FEDERAL RULES OF EVIDENCE MANUAL 200–201 (2d ed. 1977). In an effort to expedite the Federal Rules generally, Congress adopted a general rule, Rule 501, which basically provides for the continuation of common law in the privilege area. The Committee deemed the approach taken by Congress in the Federal Rules impracticable within the armed forces.

Unlike the Article III court system, which is conducted almost entirely by attorneys functioning in conjunction with permanent courts in fixed locations, the military criminal legal system is characterized by its dependence upon large numbers of laymen, temporary courts, and inherent geographical and personnel instability due to the worldwide deployment of military personnel. Consequently, military law requires far more stability than civilian law. This is particularly true because of the significant number of non-lawyers involved in the military criminal legal system. Commanders, convening authorities, non-lawyer investigating officers, summary court-martial officers, or law enforcement personnel need specific guidance as to what material is privileged and what is not.

Section V combines the flexible approach taken by Congress with respect to privileges with that provided in the 1969 Manual. Rules 502–509 set forth specific rules of privilege to provide the certainty and stability necessary for military justice. Rule 501, on the other hand, adopts those privileges recognized in common law pursuant to Federal Rules of Evidence 501 with some limitations. Specific privileges are generally taken from those proposed Federal Rules of Evidence which although not adopted by Congress were non-controversial, or from the 1969 Manual.

Rule 501 is the basic rule of privilege. In addition to recognizing privileges required by or provided for in the Constitution, an applicable Act of Congress, the Military Rules of Evidence, and the Manual for Courts-Martial, Rule 501(a) also recognizes privileges "generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by court-

martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual." The latter language is taken from 1969 Manual Para. 137. As a result of Rule 501(a)(4), the common law of privileges as recognized in the Article III courts will be applicable to the armed forces except as otherwise provided by the limitation indicated above. Rule 501(d) prevents the application of a doctor-patient privilege. Such a privilege was considered to be totally incompatible with the clear interest of the armed forces in ensuring the health and fitness for duty of personnel. *See* 1969 Manual Para. 151 *c*

It should be noted that the law of the forum determines the application of privilege. Consequently, even if a service member should consult with a doctor in a jurisdiction with a doctor-patient privilege for example, such a privilege is inapplicable should the doctor be called as a witness before the court-martial. Subdivision (b) is a non-exhaustive list of actions which constitute an invocation of a privilege. The subdivision is derived from Federal Rule of Evidence 501 as originally proposed by the Supreme Court, and the four specific actions listed are also found in the Uniform Rules of Evidence. The list is intentionally non-exclusive as a privilege might be claimed in a fashion distinct from those listed.

Subdivision (c) is derived from Federal Rule of Evidence 501 and makes it clear that an appropriate representative of a political jurisdiction or other organizational entity may claim an applicable privilege. The definition is intentionally non-exhaustive.

1999 Amendment: The privileges expressed in Rule 513 and Rule 302 and the conforming Manual change

in R.C.M. 706, are not physician-patient privileges and are not affected by Rule 501(d).

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Rule 513. Psychotherapist-patient privilege

1999 Amendment: **Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the Uniform Code of Military Justice. Rule 513 clarifies military law in light of the Supreme Court decision in *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L.Ed.2d 337 (1996). *Jaffee* interpreted Federal Rule of Evidence 501 to create a federal psychotherapist-patient privilege in civil proceedings and refers federal courts to state laws to determine the extent of privileges. In deciding to adopt this privilege for courts-martial, the committee balanced the policy of following federal law and rules, when practicable and not inconsistent with the UCMJ or MCM, with the needs of commanders for knowledge of certain types of information affecting the military. The exceptions to the rule have been developed to address the specialized society of the military and separate concerns that must be met to ensure military readiness and national security. *See Parker v. Levy*, 417 U.S. 733, 743 (1974); *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955); *Dept. of the Navy v. Egan*, 484 U.S. 518, 530 (1988). There is no intent to apply Rule 513 in any proceeding other than those authorized under the UCMJ. Rule 513 was based in part on proposed Fed. R. Evid. (not adopted) 504 and state rules of evidence. Rule 513 is not a physician-patient privilege. It is a separate rule based on the social benefit of confidential counseling recognized by Jaffee, and similar to the clergy-penitent privilege. In**

keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces. *See* the analyses for Rule 302 and Rule 501.

(a) *General rule of privilege.* The words "under the UCMJ" in this rule mean Rule 513 applies only to UCMJ proceedings, and do not limit the availability of such information internally to the services, for appropriate purposes.

(d) *Exceptions* These exceptions are intended to emphasize that military commanders are to have access to all information that is necessary for the safety and security of military personnel, operations, installations, and equipment. Therefore, psychotherapists are to provide such information despite a claim of privilege.